85 - 1719

No.

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DANNY M. OWENS, Individually, and
AMAL INVESTMENTS, INC., Petitioners

V.

STATE OF TENNESSEE, Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

_____

No. _____

DANNY M. OWENS, Individually, and
AMAL INVESTMENTS, INC., Petitioners

V.

STATE OF TENNESSEE, Respondents

PETITION FOR WRIT OF CERTIORARI

I
QUESTIONS PRESENTED FOR REVIEW

Whether the treaty which existed between the United States and the United Kingdom and Northern Ireland prohibited the State of Tennessee from pursuing the course of action it took in the Chancery Court of Shelby County, Tennessee against the Petitioner, Owens.

II

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STATEMENT OF JURISDICTION

The Order of the Supreme Court of Tennessee denying the Petitioner's Application to Appeal was entered on January 21, 1986. This Petition for Writ of Certiorari is timely filed within ninety (90) days of the entry of the Order by the Supreme Court of Tennessee. Jurisdiciton is conferred upon this Court pursuant to 28 U.S.C. Section 1257(3).

V

CONSTITUTIONAL PROVISIONS AND TREATIES ININVOLVED

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

Laws of any State to the Contrary notwithstanding." U. S. CONSTITUTION art. VI, cl. 2. (Emphasis Added).

"(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State--

(a) until after he has returned to the territory of the requested Party; or

(b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(2) the provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition." Extradition Treaty between the Government of the United States and the Government of the United Kingdom and Northern Ireland, Art. XII; 28 U.S.T. 227. (Emphasis Added).

VI

STATEMENT OF THE CASE

On the 2nd day of October, 1981, Danny Owens, Petitioner was indicted by the Shelby County Grand Jury, along with Danny's Sandwich Shop, Inc., d/b/a/

Danny's for violations of the Tennessee Code involving obsenity in cause numbers 81903, 81904, 81905, and 81907.

On February 5, 1982, the Petitioner, Owens, was indicted by the Shelby County Grand Jury on five counts of Assault to Commit Murder, 1st Degree, in cause numbers B-84294, B-84295, B-84296, B-87463, and B-87464.

In October, 1982, Danny Owens, Petitioner, was arrested in London, England, on a fugitive warrant from the United States.

On February 4, 1983, an order of extradition was entered, extraditing Owens from London, England, to Memphis, Tennessee, pursuant to an extradition treaty that existed between Great Britain and the United States, to stand trial for the five counts of assault to Commit Murder. The Petitioner, Owens, was not

extradited for the non-extraditable misdemeanor offenses listed in paragraph one above.

On August 26, 1983, jury verdicts were returned against Danny's Sandwich Shop, Inc., d/b/a Danny's on the obscenity charges listed in paragraph one, supra, in Division I of the Criminal Courts of Shelby County, Tennessee, and fines totalling $200,000.00 were levied against the business.

By the admission of the State prosecuting Attorneys, the Petitioner, Owens was not tried because he was immune from prosecution because of the treaty which existed between the United States and The United Kingdom.

The extraditable offenses of assault to commit murder were transferred from Division IV of the Crimainal Courts of Shelby County, Tennessee, to Division III

of the Criminal Courts of Davidson County, Tennessee, upon the Motion of Petitioner, Owens, for a change of venue. These cases were disposed of on March 13, 1984, in Division III of the Criminal Courts of Davidson County, Tennessee, when Owens entered guilty pleas to the lesser included offenses of assault and battery. April 10, 1984, the Judge of Division III of the Criminal Courts of Davidson County, Tennessee, entered an order suspending the sentence of Owens and placing him on five years probation which does not expire until March 30, 1989.

On March 15, 1984, the misdemeanor obscenity charges listed in paragraph one above were dismissed against Ownens, individually, by the State of Tennessee in Division I of the Criminal Courts of Shelby County, Tennessee.

Article XII of the extradition

treaty between Great Britain and the United States prohibited Owens from being proceeded against in the United States for any offenses occurring before his extradition, other than the extraditable offense established by the facts and for which he was being extradited, until after he was either returned to England or until the expiration of 30 days after he was free to return to England or its territories.

The probation order entered by the Judge of Division III of the Criminal Court of Davidson County, Tennessee, which does not expire until March 30, 1989, provides that Owens must obtain the consent of his assigned probation officer before changing residence or employment or before leaving the County of his residence or the State of Tennessee. Even now, he is not free to return to England or one of

its territories.

The attorney representing Danny's Sandwich Shop, Inc., and the accountant for Owens had contended that Danny's Sandwich Shop, Inc., was not a corporation but was a proprietorship owned by Owens at the trial of the business in Division I of Criminal Court in Shelby County, but the jury accepted the State's agrument that the business was a corporation.

Danny Owens, himself, had testified at the trial of two other night clubs owned by him, Gi Gi's and the Pink Garter, that he owned all of the clubs, including Danny's Sandwich Shop, and that it was a proprietorship and not a corporation. Owens further testified in the case at bar that he had bought Danny's Sandwich Shop from a man named Danny Elliott and that Elliott had apparently obtained a corporate charter but had never really

operated as corporation. Owens testified that initially he did not change the corporate name with the beer board because he was a convicted felon and not eligible to obtain permits in his name until eight years after his conviction. Later, after the eight year requirement had lapsed, all permits from the beer board were obtained in the name of Owens and not in a corporate name.

The testimony of Owens and his bookkeeper showed that the bank account for the business had always been in the name of Owens as an individual and had never been in a corporate name. Their testimony also showed that income tax returns for the business were filed as a proprietorship.

On or about October 21, 1983, when Owens learned that the State might attempt to execute against his business known as

Danny's at 3450 Airways Blvd., Memphis, Tennessee, to satisfy the fines imposed against Danny's Sandwich Shop, Inc., by the jury verdicts in Division I of Criminal Court on August 26, 1983, he filed for an injunction and temporary restraining order in the Chancery Court of Shelby County, Tennessee. A restraining order was issued that same date in Cause No. 90583-2.

Subsequently, the State of Tennessee responded and filed Counter-Complaints, to have the $200,000.00 in fines originally assessed against the corporation, assessed against the Petitioner, Owens, individually, to which the Petitioners filed Answers, as well as, Motions for Summary Judgment based upon lack of subject matter and personal juridiction. The Memorandum in suport of the Motions for Summary Judgment affirmatively

setforth the immunity conferred by the treaty. After a hearing on the merits, the Chancellor ruled in favor of the State of Tennessee. The Chancery Court of Shelby County, Tennessee, in its Final Decree (See Appendix A) held that the extradition treaty between the United States and the United Kingdom and Northern Ireland was not intended to cover civil actions.

Pursuant to the Tennessee Rules of Appellate Procedure, the Petitioners timely perfected their appeal to the Court of Appeals of Tennessee for the Western Section at Jackson, setting forth the application and prohibitions of the treaty as one of the issues to be reviewed. The Court of Appeals in its opinion dated August 12, 1985, (See Appendix B) after finding that the language contained in article XII paragraph 1 of the treaty was

not intended to be used to obtain jurisdiction of the prisoner except for the extradited offense, held:

> We think they also did not mean for the treaty to be used to obtain civil jurisdiction over the prisioner when he could not otherwise be subject to such jurisdiction.

The Court of Appeals noted that the Petitioner, Owens, was amenable to service of process of the Chancery Court of Shelby County, Tennessee by virtue of the Long-Arm Statute, T.C.A. Section 20-2-214 (1980). Thus, the rights of the State of Tennessee were not enlarged and the treaty would not provide immunity in this case.

From the decision of the Court of Appeals, the Petitioners timely filed their Application for Permission to Appeal to the Supreme Court of Tennessee again setting forth the applications and prohibitions of the treaty as an issue to be reviewed by the Court. On January 21,

1986, the Supreme Court of Tennessee, without comment, denied the Petitiners Application for Permission to Appeal. (See Appendix C).

VII

REASONS FOR ALLOWING WRIT

In the courts below the State of Tennessee argured that the Treaty between the United States and the United Kingdom could not prevent the State of Tennessee from proceeding against the Petitioner, Owens, on any other matters, even after he was extradited from The United Kingdom pursuant to the Treaty. Among the things argued by the State of Tennessee was that the Petitioner, Owens, could have been sued under the provisions of the Tennessee Long Arm Statute if he had remained in England. They also took the position that since the Petitioner, Owens, instituted an injunction complaint in the Trial Court to

prevent the State of Tennessee from seizing his property to satisfy fines levied against a corporation, he thereby waived any protection he would have otherwise had under the provisions of the Treaty.

The fallacies of such arguments are clearly evident when the facts in this cause are viewed in light of the existing case law, and since the State of Tennessee initially chose to invoke the terms and provisions of the Treaty in February, 1983, for the purpose of returning the Petitioner, Owens, to the State of Tennessee to stand trial for the charges of assault to commit murder.

Just as a person can be illegally abducted in a foreign country and brought to the United States to stand trial for a particular offense, or returned to the United States from a foreign country under

"comity", and then tried for additional offenses which occurred prior to his return, we agree that the Petitioner, Owens, could have been sued or procceeded against under the Long Arm Statute and had no immunity from such suit had the Treaty not been invoked. However, once the Petitioner, Owens, was returned at the State's request for the specific offenses listed in the Extradition Order pursuant to the Treaty, it is as meaningless to agrue that he could have been sued under the Long Arm Statute if he had remained in England, as it would be to argue that he could have been proceeded against on other matters if he had been abducted or returned under "comity", instead of having been returned under the provisions of the Treaty.

The point is that the Treaty (the Supreme law of the Land) was invoked at

the State's request, and the State's action clothed the Petitioner, Owens, with all the treaty's protection and immunity, regardless of any state statute or state court decision to the contrary.

As previously stated, the Petitioner, Danny Owens, was extradited from London, England in February, 1983, on five counts of assault to murder, pursuant to the extradition treaty which existed between the United States and the United Kingdom. The Petitioner, Danny Owens, was not extradited for the misdemeanor obsenity offenses, for which he was indicted by the Shelby County grand jury on October 2, '981, as these were non-extraditable offenses.

The pertinent part of the treaty is article XII which states as follows:

"(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any

offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State---

(a) until after he has returned to the territory of the requested Party; or

(b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(2) the provisions of paragraph (1) of this Article shall not apply to offenses committed or matters arising, after the extradition." (Emphasis Added)

The case law by the United States Supreme Court is crystal clear that when a person is extradited or in the process of being extradited to the United States from another country pursuant to a treaty that exists between the United States and that other country, the person cannot be proceeded against in any other civil or criminal proceedings. See In Re Baruch, 41, F. Rep. 472 (1980), which cited In Re Reinitz, 39 F. Rep 204 (1889) and the case

of U.S. v. Rauscher, 119 U.S. 407, 7 Sup. Ct. Rep. 234 (1890). The Court in Baruch paraphrasing Rauscher stated at 473:

> That the principle is that the proceeding under the treaty is for a limited and defined purpose only, and that the exercise of jurisidiction over the prisoner for any other purpose than that mentioned in the treaty, until he has had an opportunity to return, is a fraud upon the rights of the party extradicted, and bad faith to the country which permitted the extradiction. (Emphasis Added).

In Shapiro v. Ferrandiana, 478 F. 2d 894 (2nd Cir), cert. den. 414 U.S. 894 (1973), which cites Rauscher and distinguishes the "rule or principle of specialty," long recognized in international law, from the "rule of domestic law" set out in the Rauscher case, the Court points out that the "rule or principle of specialty," recognized in international law provides that the requisitioning state may not, without the permission of the asylum state try or

punish the fugitive for any crimes committed before the extradition except the crimes for which he was extradited, and then further reflects that as a matter of international law, the "principle of specialty" has been viewed as a principle of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused. However, the "rule of domestic law" established by the Rauscher Court is based upon Article 6, Clause 2 of the U. S. Constitution which states:

> " This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Lwaws of any State to the Contrary notwithstanding."

In other words, the United States, as the asylum state, can ignore the treaty

when it is extraditing people to other countries under the "rule of specialty" of international law if it chooses to do so. However, no court in the United States can ignore the provisions of a treaty when a person is extradited to the United States from another country because of the "rule of domestic law" established by Rauscher which is a right accruing to the accused by the Supremacy Clause set out in Article 6, Clause 2, of the United States Constitution--Treaties are the Supreme Law of the Land. The Rauscher decision made it clear that this is not merely a right accruing to the asylum state as is the "principle of specialty" under international law but is also a right accruing to the accused under the Supremacy Clause.

In the case of Blumen v. Haff, 78 F. 2d 833 (1935), the Circuit Court of

Appeals for the Ninth Circuit stated as follows:

"The Supreme Court of the United States has held that the extradited person shall not be arrested or tried for any other offense than that with which he is charged in the extradition proceedings until he shall have had a reasonable time to return unmolested to the country from which he was brought... This applies also to an arrest upon a civil process."

See also Moore on Extradition, Volume 1, page 272, cited by the Court of appeals for the Second Circuit in the case of United States ex rel. Donnelly v. Mulligan, 74 F. 2d 220 (1934) which quoted Moore as follows:

> As to all acts antecedent to his surrender, save only the offense or offenses for which he was delivered up, the prisoner is entitled to the same measure of protection as if he had not left the jurisdiction of the surrendering government. This is what is meant by his 'right of return." He is not required to return; he must have opportunity to do so; and until he has had such opportunity, the courts have not, as was said in the Rauscher case, jurisdiction of the person so as to subject him to trial for other offenses than that for which he has been surrendered. The fugitive having been delivered up for the sole purpose of being tried for the offense with which he is charged, and

> the disability of the courts being jurisdictional, it follows that the prisoner is not liable to other process for civil any more than for general criminal process."

The Court of Appeals for the Second Circuit in Mulligan then stated:

"It might be added, nor for 'sui genaris' purposes."

It is evident from the foregoing authorities that the civil proceedings in Chancery Court in this cause were barred by the treaty, the same as other criminal proceedings would have been barred, since the fines these civil proceedings were based on and came from indictments that had been returned against Owens and Danny's Sandwich Shop, Inc., prior to his extradition the the United States under the treaty with England.

A person can be kidnapped or illegally seized in an asylum state and brought to the United States and tried in

our Courts for any offense whatsoever, even when a treaty exists between the United States and that asylum state that would have prevented such proceedings if the person had been extradited pursuant to the treaty. Kerr v. Illinois, 119 U.S. 436 (1980). A person can also be brought back to the United States from asylum states where comity exists between the United States and the asylum state and tried for any offenses without limitation. Fiocconi v. Attorney General of United States, 462 F. 2d 475 (2ndCir. 1972), and United States v. Sobell, 142 F. Supp 515 (1956). But where a treaty exists and the person is extradited to the United States pursuant to that treaty, no proceedings, that are based upon circumstances occurring prior to extradition, can be had against the person extradited other than those relating to the specific offense or

offenses for which he was extradited to the United States. This is because of the Supremacy Clause contained in Article 6 of the U.S. Constitution.

The foregoing statement is evinced by the holding of the Court in United States v. Sobell 142 F. Supp. 515 at page 524 (1956), wherein the Court cited the case of Frisbie v. Collins, 342, U.S. 519 (1952), where Mr. Justice Black stated:

"This Court has never departed from the rule announced in Kerr v. Illinois, 119 U.S. 436, 444, 7 S. Ct. 225, 229, 30 L. Ed. 421, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reasons of a 'forcible abduction.' No pursuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the constitution that requires a cort to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

The Court in Sobell then went on to state as follows:

"One exception to the general rule follows where the United States has invoked an extradition treaty in order to compel a foreign state to surrender a fugitive. In such circumstances, if the United States then tries the fugitive for a crime other than the one for which extradition was granted, it will be held to have violated the contractual obligation of the treaty and the courts will find themselves to be without jurisdiction over the defendant unless he waives this issue. This rule was enunciated in United States v. Rauscher, supra; and followed in United States ex rel. Donnelly v. Mulligan, supra; Cosgrove v. Winney, supra; and Johnson v. Browne, supra. The compatibility of the Rauscher and Kerr doctrines is illustrated by the fact that both were decided on the same day with the same Justice writing for the Court. Kerr clearly distinguished the Rauscher situation as one in which the fugitive is clothed in the rights of the treaty." (Emph. added).

At this point, it is important to note that the Tennessee Court of Appeals below stated that the treaty was not intended to be used to obtain jurisdiction over a person except for the crime for which he was extradited, including civil

jurisdiction over the person when he would not otherwise be subject to such jurisdiction. The Court of Appeals then stated that the treaty was not to be used to gain an advantage not otherwise available, and the Petitioner, Danny Owens, was amenable to process in England by virture of the Long Arm Statute, and therefore, the treaty did not provide immunity in the case at bar.

The Petitioner, Danny Owens, respectfully disagrees with Appellate Court, in that we are dealing with what actually happened (the Petitioner, Danny Owens, was extradited from England); not what could have happened (service under the Long Arm Statute), and therefore the trial court lacked jurisdiction over the person of the Appellant, Danny Owens. For example, if a person is charged in the United States with two extraditable

offenses, but is only extradited on the first offense, he could not be tried for the second offense on the basis that it too was an extraditable offense and he could have been extradited for it.

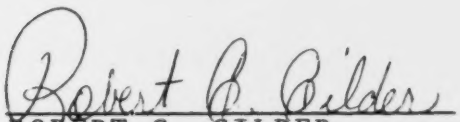
As previously stated, when a person is returned to this country pursuant to an extradition treaty, and not by abduction or comity, the courts of this country are without jurisdiction over the person except for the extradited offense.

VIII

CONCLUSION

The Petitioners, Danny Owens and Amal Investments. Inc., respectfully request for the above and foregoing reasons that the Supreme Court grant this Petition for Writ of Certiorari as to the issues of immunity provided by the treaty and the imposition of the $200,000.00 in fines against the Appellants.

Respectfully submitted,



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C E R T I F I C A T E

I, Robert G. Gilder, do hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served on the Respondent by mailing postage prepaid 3 copies of same to Honorable Thomas B. Avery, 2112 First Tennessee Bank Building Memphis, Tennessee 38103, and Honorable James C. Beasley, Jr., Assistant Attorney General, 201 Poplar Avenue, Memphis, Tennessee 38103.

This the 19 day of April, 1986.

Robert G. Gilder

ROBERT G. GILDER

APPENDIX A

IN THE CHANCERY COURT OF
SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE

Counterclaimant

vs. NO. 90583-2

DANNY M. OWENS, Individually,
DANNY'S SANDWICH SHOP, INC., and
AMAL INVESTMENTS, INC.

Counter-Defendants

FINAL DECREE PIERCING CORPORATE VEIL, SETTING ASIDE FRAUDULENT CONVEYANCES AND ENJOINGING COUNTER-DEFENDANT OWENS

This cause came on to be heard before the Honorable George T. Lewis, Chancellor, sitting without a jury, on September 11 and 12, 1984, and the Court having heard all the evidence, finds that: jury verdicts totalling $200,000.00 plus Court costs were assessed against Danny's Sandwich Shop, Inc., d/b/a Danny's in the

Criminal Court of Shelby County, Tennessee, Division I, in cause Numbers 81903, 81904, 81905 and 81907 on August 26, 1983; that Danny's Sandwich Shop, Inc., d/b/a Danny's is not operated as a legitimate corporation but, it, in fact, is the alter ego of its sole stockholder Danny M. Owens; that the State of Tennessee's cause of action against Danny M. Owens did not accrue until said criminal judgment was final; that the extradition Treaty between the United States and the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as the "Treaty") was not intended to cover civil actions such as the case at bar; that the rights under the Treaty's Rule of Specialty are the rights of the asylum state - Great Britain - and can be exercised only by Great Britain or by Danny M. Owens through Great Britain if

he followed the proper diplomatic procedures; that by filing this lawsuit Danny M. Owens waived any rights he may have had under the Treaty; that the defense of the Treaty was not pled except by amendment after the close of the proof; and, that the $10,000.00 consideration paid for the conveyances of the assets of Danny M. Owens, individually and of Danny's sandwich Shop, Inc., d/b/a/ Danny's to AMAL Investments, Inc., on October 19, 1983, was so inadequate as to shock the conscience of the Court; that the State of Tennessee is therefore entitled to a judgment against Danny M. Owens, individually, in the principal amount of $200,000.00 plus interest from August 26, 1983, until September 12, 1984, at the rate of ten percent (10%) per annum or $20,931.43 as well as the sum of $668.00 in criminal court costs for a

total judgment of $221,599.43;

That the temporary restraining Order heretofore entered in favor of Danny M. Owens should be dissolved; and that the temporary restraining Order heretofore entered in favor of the State of Tennessee, enjoining Danny M. Owens from transferring, mortgaging or encumbrancing any property, real or personal, owned or controlled by him, should be made a permanent injunction, until such time as the State's judgment is satisfied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That judgment is hereby entered against the Counter-Defendant, Danny M. Owens, personally and in favor of the State of Tennessee for $221,599.43;

2. That the conveyance of the assets of Danny's Sandwich Shop, Inc., d/b/a Danny's, from Danny M. Owens to AMAL

Investments on October 19, 1983, be, and it is hereby, set aside and annulled;

3. That the conveyance of the assets of Danny's Sandwich Shop, Inc., from Danny's Sandwich Shop, Inc., to AMAL Investments on October 19, 1983, be, and it is hereby set aside and annulled;

4. That Danny M. Owens be, and he is hereby, enjoined from transferring, mortgaging or encumbrancing any property, real or personal, owned or controlled by him which might be subject to the State of Tennessee's judgment, until such time as the State of Tennessee is able to satisfy the judgment;

5. That Danny M. Owen's prayer for an injunction against the State of Tennessee be, and it is hereby, denied;

6. That the costs of this cause be, and they are hereby assessed against the Counter-Defendants, Danny M. Owens,

AMAL-Investments, Inc., and Danny's Sandwich Shop, Inc., for which costs and all other relief herein let execution issue.

Entered this ___ day of _____, 1984.

_____
CHANCELLOR GEORGE T. LEWIS

APPROVED:

_____
THOMAS B. AVERY
ATTORNEY FOR STATE OF TENNESSEE

Robert Gilder
ROBERT GILDER
ATTORNEY FOR DANNY M. OWENS
AND AMAL

APPENDIX B

IN THE COURT OF APPEALS OF
APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

DANNY M. OWENS, Individually,
and AMAL INVESTMENTS, INC.,

Counter-Defendant/Appellants,

vs. Shelby Equity No. 40

STATE OF TENNESSEE,

Counter-Claimant/Appellee.

ORDER

This matter came on to be regularly considered by the Court on the record and for the reasons stated in the Court's Opinion, of even date, it is Ordered:

1. That the judgment of the trial court awarding interest on the fines is reversed.

2. The judgment in all other respects is affirmed and this case is

remanded for such further proceedings as necessary.

3. Costs are assessed equally between appellants and appellee.

CRAWFORD, J.

TOMLIN, J.

HIGHERS, J.

IN THE COURT OF APPEALS
OF TENNESSEE
WESTERN SECTION AT JACKSON

DANNY M. OWENS, Individually,
and AMAL INVESTMENTS, INC.,

Counter-Defendants/Appellants,

vs. Shelby Equity No. 40

STATE OF TENNESSEE,

Counter-Claimant/Appellee.

From the Chancery Court of Shelby County
Honorable George T. Lewis, Chancellor

Steven G. Roberts of Southaven,
Mississippi
Robert G. Gilder of Southaven,
Mississippi
Arch B. Boyd of Memphis
For Appellants

Thomas B. Avery of Memphis
Ed Mullikin of Memphis
Valerie Futris of Memphis
For Appellee

REVERSED IN PART, AFFIRMED IN PART AND

REMANDED

Opinion filed:

CRAWFORD, J.

TOMLIN, J. (Concurs)
HIGHERS, J. (Concurs)

The issues in this case are:

I. Whether the extradition treaty between the governments of the United States and the United Kingdom and Northern Ireland precludes the appellee, State of Tennessee, from pursuing the Chancery Court action against the appellant, Danny Owens.

II. Whether the trial court erred in piercing the corporate veil of Danny's Sandwich Shop, Inc., and holding Danny M. Owens, its sole shareholder, personally liable for the criminal fines assessed against the corporation.

III. Whether the trial court was correct in awarding judgment against Owens for the interest on the fines from the date of their imposition.

The pertinent, undisputed facts of this case are as follows: On April 7, 1980, the charter for Danny's Sandwich Shop, Inc., was duly recorded in the Secretary of State's Office, State of Tennessee, pursuant to the Tennessee General Corporations Act, now T.C.A. Section 48-1-201 et seq., (1984). On

that same date, appellant Danny M. Owens, purchased 100 shares of the authorized stock constituting all the issued and outstanding stock of the corporation for the sum of $1,000.00. On October 2, 1981, the Shelby County Grand Jury returned four separate indictments for obscenity offenses in violation of T.C.A. Section 39-3004 against certain individuals, Owens individually, and Danny's Sandwich Shop, Incorporated, d/b/a Danny's for incidents that had occurred in April and May of 1981.

On February 5, 1982, the Shelby County Grand Jury returned indictments against Owens individually on several charges of assault to murder. These latter indictments resulted in Owens' arrest in London, England in October of 1982, and his extradition to Tennessee

to stand trial on these specific charges. The extradition order dated February 4, 1983, was entered pursuant to the extradition treaty between the governments of the United States and the United Kingdom and Northern Ireland. In March, 1984, Owens entered guilty pleas to these charges and his sentence, among other things, provided for five years of probation, thus prohibiting him from leaving the state for that period of time.

Danny's Sandwich Shop, Incorporated, d/b/a Danny's and the individuals involved except for Owens were tried in criminal court in August, 1983, on the obscenity charges. On August 23, 1983, the jury returned guilty verdicts against all defendants. The corporate defendant was fined $50,000.00 on each charge for a total of

$200,000.00 and was also assessed court costs in all four cases. The obscenity charges against Owens individually were not tried at that time and were later dismissed by the state in March of 1984.

On October 19, 1983, Owens individually by written agreement and for a stated consideration of $10,000.00 conveyed the business assets of Danny's Sandwich Shop to a newly formed corporation, Amal, Inc., which, in addition to Owens, is a counter-defendant/appellant in the case before us. Two days later, Owens and Amal, Inc., filed the present suit to enjoin the State of Tennessee from attaching the assets of Amal or Owens individually. The state counter-claimed seeking to have the $200,000.00 in criminal fines that had been assessed against Danny's Sandwich Shop,

Incorporated, d/b/a Danny's, awarded as a judgment against Owens individually and to have the conveyances from Owens to Amal, Inc., set aside.

After a trial on the merits, the chancellor found that there was an existent corporation, that the conveyance by Owens to Amal was fraudulent by virtue of the inadequate sales price, and that the treaty relied upon by Owens did not prevent the state from proceeding against Owens individually in the civil suit. Judgment was entered piercing the corporate veil and subjecting Owens to personal liability for the criminal fines, plus 10% interest from the date the fines had been assessed by the criminal court jury. Owens and Amal, Inc. appeal from this judgment.

Since this case was tried by the

court sitting without a jury, we review the case de novo upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

Issue No. I

> Whether the extradition treaty between the governments of the United States and the United Kingdom in Northern Ireland precludes the appellee, State of Tennessee, from pursuing the Chancery Court action against the appellant, Danny Owens.

As noted, Owens was extradited from London, England, in February, 1983, on assault to murder charges. Apparently, no attempt was made to extradite him on the pending obscenity charges because obscenity is not specifically included in the treaty as an extraditable offense.

The pertinent part of the

applicable treaty states:

Article XII

> (1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State-
> (a) until after he has returned to the territory of the requested Party; or
> (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.
> (2) The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition.

Extradition Treaty, October 21, 1976, United States-United Kindom and Northern Ireland, art. XII, 28 U.S.T. 229, 233, T.I.A.S. No. 8468.

The foundation of Owens' argument that the treaty affords him protection from liability in this lawsuit is a principle of international law referred to as the "rule of specialty" which, as

stated in the words of the United States Supreme Court in United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234 (1886) provides:

> [w]e have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up....

Id. at 419.

At least one text writer has succinctly stated the rationale for the doctrine of specialty as follows:

> The rationale for the doctrine rests on the following factors: (1) The requested state could have refused extradition if it knew that the relator would be prosecuted or punished for an offense other than the one for which it granted extradition.
>
> (2) The requesting state did not have in personam jurisdiction over the relator, if not for the requested state's surrender of that person.
>
> (3) The requesting state could not

> have prosecuted the offender, other than in absentia, nor could it punish him or her without securing that person's surrender from the requested state.
>
> (4) The requesting state would be abusing a formal process to secure the surrender of the person it seeks by relying on the requested state who will use it processes to effectuate the surrender.
>
> (5) The requested state would be using its processes in reliance upon the representations made by the requesting state.

M. Cherif Bassiouni, International Extradition and World Public Order, P. 353, 1974.

Owens contends that this rule of specialty operates to protect him from civil proceedings as well as from criminal prosecution other than on the assault to murder charges for which he was extradited. He further aserts that since he is unable to leave the country because of his probation, he is entitled to the provisions of the treaty allowing him to return to England before he is

"proceeded against....for any other matters" i.e., liability for the fines.

On the other hand, the State of Tennessee contends that the rule of specialty is not applicable to civil actions and even if it is applicable, the civil action involved herein arose after Owens was extradited. The State also asserts that Owens lacks standing to raise the treaty as a defense because such a right belongs to the other party to the treaty, the United Kingdom, and that even if Owens could rely on the defense he has waived his rights by initiating this suit.

Owens relies upon two cases, In Re Baruch, 41 F. 472 (1890) and In Re Reinitz, 39 F. 204 (1889) in support of his contentions. In these federal cases, the courts construed other extradition treaties with similar rules

of specialty language and held that the extraditees were not subject to civil arrest after the termination of the proceedings for which they had been extradited. In Baruch, the court stated,

> the proceeding under the treaty is for a limited and defined purpose only and ...the exercise of jurisdiction over the prisoner for any other purpose than that mentioned in the treaty, until he has an opportunity to return [to the extraditing country], is [acting in] ... bad faith to the country which permitted the extradition.

41 F. at 473.

While we agree with the federal court holdings and the Baruch statement, the extent of the application of the rule of specialty must of necessity be determined by the terms and provisions of the treaty involved. The treaty before us specifically provides that the extradited person shall not be

"proceeded against....for any offense other than an extraditable offense ....of which his extradition has been granted, or on account of any other matters..." (emphasis supplied). Extradition Treaty, supra, art. XII, para. 1. This language indicates that the parties to the treaty did not intend for it to be used to obtain jurisdiction of the prisoner except for the crime for which he was extradited. We think they also did not mean for the treaty to be used to obtain civil jurisdiction over the prisoner when he would not otherwise be subject to such jurisdiction. Our interpretation of this language is fortified by the provisions of Paragraph 2 of Article XII limiting the application of the rule of specialty so that it would not apply to "offenses committed or matters arising, after

extradition" (emphasis supplied). Adhering to the rational for the rule of specialty previously cited, we feel that the protection afforded by this treaty applies only to the extent that jurisdiction could not otherwise be legally obtained. In other words, we interpret the intent of the parties to the treaty to be that the treaty shall not be used to gain an advantage that would not otherwise be available to the prosecuting party. This would restrict the rights of the requesting state to the limits to which it would have been restricted if extradition had not taken place.

In the case before us, Owens was amenable to service of process from the Chancery Court of Shelby County, Tennessee, by virtue of the Long Arm Statute, now T.C.A. Section 20-2-214

(1980) and the court could have obtained jurisdiction over him even if he had remained in England. We note also that Owens initiated the present action seeking an injunction and that the State of Tennessee sought affirmative relief by way of a counter-claim, all of which could have been accomplished had Owens remained in England. Thus, the rights of the prosecuting party, the State of Tennessee, are not enlarged by virtue of the extradition and the treaty should not provide immunity in the instant case.

We note further that the cause of action involved in the present case involves a civil liability that arose only after the corporation had incurred liability for the fines. Since the cause of action arose subsequent to the extradition, the treaty would not be

applicable to provide any protection to Owens.

For the reasons stated, the treaty between the governments of the United States and the United Kingdom and Northern Ireland does not prevent this suit against Owens.

Issue No. II

> Whether the trial court erred in piercing the corporate veil of Danny's Sandwich Shop, Inc., and holding appellant Danny M. Owens, its sole shareholder, personally liable for the criminal fines assessed against the corporation.

Appellant Owens' brief contend:

> That he used the business, Danny's Sandwich Shop or Danny's Sandwich Shop, Inc., just as if the business were he and that he used the funds of the business and his own funds interchangeably because he and the business were the same. Appellant further concedes that the alleged corporation was a legal myth ....Appellant never contended that the business was a legal corporation....

The State of Tennessee argues:

> That Owens selectively ignored the

> corporate structure [and]...failed to observe corporate formalities. [Owens'] acts and omissions were such that they warrant the trial court's disregarding the corporate entity and holding Owens individually liable for the criminal judgments.

Whether the corporation is a "mere instrumentality of an individual" is ordinarily a question of fact. Electric Power Board of Chattanooga v. St. Joseph Valley Structual Steel Corp., 691 S.W. 2d 522, 526 (Tenn. 1985). The chancellor found and the proof supports that there was a corporation in existence for a time. The proof and testimony in support of this finding centered around Owens' business activities with regard to registering the business' corporate charter, obtaining beer licenses, filing state and federal tax returns and liquidating the corporation. Forms and letters dealing with these activities as well as

bookkeeping records and bank accounts were submitted as trial exhibits. The State contends that agents acting for the corporation engaged in these various activities while Owens says that he and others working for him merely acted in their individual capacities for his sole proprietorship business. We shall discuss the testimony regarding each of these business activities to explain why we agree with the chancellor.

As previously noted, the corporate charter for the subject business was recorded on April 7, 1980. Both State of Tennessee and Shelby County officials testified that the charter was duly recorded in their respective offices and that there had been no dissolution articles filed as of the time of this trial.

With regard to the beer licenses,

the proof shows that Owens applied for a beer permit on July 22, 1980, for "Danny Owens, d/b/a Danny's Sandwich Shop, Inc." and that the alcohol commission issued the permit on July 29, 1980 in that name. The 1981 permit was issued in the same names but the 1982 and 1983 permits were in the name of "Danny Owens d/b/a Danny's Sandwich Shop." Appellant produced a copy of the license renewal application filed September 11, 1981, listing the name of the business as "Danny's" and listing the business as a "proprietorship."

With regard to the business activities concerning the State of Tennessee Department of Revenue, Sales and Use Tax Division, the proof indicates that on September 22, 1980, Owens' bookkeeper, Ms. Hilty, filed an application for a certificate of

registration for a corporation named "Danny's." This division of the department of revenue assigned Danny's an identification number and began receiving reports and payments from the business in April, 1982. The division received subsequent reports and tax payments until October, 1983, when Ms. Hilty sent a return marked "UNDER THE ABOVE NAME (DANNY'S) THIS IS A FINAL REPORT, BUSINESS NO LONGER EXISTS."

The 1980 franchise and excise tax form was sent to that same State Department of Revenue and was signed by Owens as president and dated August 11, 1981. A franchise and excise division representative wrote to Danny's on June 29, 1982, to request a tax return for 1981 and to ask other questions about the 1980 return. Although the record does not contain a copy of the 1981

return, the franchise tax division director wrote the following on September 9, 1982:

> We acknowledge receipt of the corporation's franchise, excise tax return for the calendar year 1981.... We also note that the corporation indicated that the assets and liabilities were liquidated. Please advise this office of the date of the liquidation and the disposition of these assets. If you wish to surrender the corporation's charter, please advise this office and we will inform you of the requirements to surrender the corporation's charter.

On October 5, 1982, Ms. Hilty responded:

> Disposition of assets - The assets of the corporation were acquired on March 31, 1981, by the stockholder.
>
> Surrender of Charter - We do not wish to surrender the charter of the corporation. The corporation is just in an "inactive" status.

The 1981 Federal Corporate Tax Return for Danny's Sandwich Shop, Inc., reflects that the corporation assets were liquidated and distributed to Danny

Owens on March 30, 1981. Owens' personal federal tax return for that year showed a sizeable portion of Danny's Sandwich Shop's reported income as proprietorship income. In addition, his personal return listed the value of the assets that had been distributed to him at liquidation as capital gains income. Owens individually paid taxes on both these amounts. The record does not indicate when these 1981 corporate and personal tax forms were filed, but does include copies of the returns dated June 8, 1982, and June 15, 1982, respectively.

Although Owens now contends that there never was a corporation, this proof indicates that for some reason he attempted to establish in the summer of 1982 that there was a corporation and it had been liquidated in March, 1981.

With this proof, we cannot say that the evidence preponderates against the chancellor's finding that there was a corporation.

Having established that a corporation existed, we turn to the second question involved in this issue - whether the corporate veil of Danny's Sandwich Shop, Inc. could be pierced to hold Owens personally liable for the fines. Tennessee law is clear in this regard. In Fidelity Trust Co. v. Service Laundry Co., 160 Tenn. 57, 22 S.W.2d 6 (1929), our Supreme Court stated:

> it is also recognized by the courts that this separate and distinct existence of a corporation is fictitious and that many special circumstances may arise in which such separate and distinct existence will be disregarded.
>
> In Towles & Co. v. Miles, 131 Tenn. 79, 85, 173 S.W. 439, the existence of a corporation

> organized and owned by a partnership was ignored, upon evidence that the corporation was a mere sham and a dummy, and the liability of the corporation was held to be a liability of the partnership. This authority was followed in Madison Trust Co. v. Stahlman, 134 Tenn. 402, 426, 183 S.W. 1012, 1018, in which the opinion rendered in the first case was quoted, as follows: "A corporation will be treated as a distinct legal entity ordinarily, and until proof is adduced to the contrary. But that notion will not prevail when the result would be to give countenance and effect to a mere sham and work injustice."

Id. at 7, 8.

Although there was a corporation, Owens operated the business interchangeably as a corporation and as an individual. He intermingled the assets of the two entities to such an extent that the corporation was a mere sham, shell or dummy. The evidence does not preponderate against the chancellor's findings in this regard. Therefore, Owens should be held

individually liable for the legal debts of the corporation.

Issue No. III

Whether the trial court was correct in awarding judgment against appellant Owens for interest on the fines from the date of their imposition.

The trial court awarded the state interest against Owens on the $200,000 in fines from the date of their rendition, August 26, 1983 until September, 1984. Owens asserts that this is error but cites no authority to substantiate that position. The state contends that the fine is the same as a judgment and pursuant of 10% per annum.

Although Ownes' brief failed to present proper arguments on this issue, we feel the importance of the issue demands the court's attention.

We have examined T.C.A. Section 39-3004, the criminal statute under which the corporation was convicted, and

the statutes dealing with fines, T.C.A. Section 40-24-101 et seq., and we are unable to find any provision authorixing interest on fines. Fines are payable when assessed, and in the case of individuals, the party may be jailed for failure to pay. We note, however, that T.C.A. Section 40-24-103 provides for confession of judgment and the giving of bonds for the fines in order to avoid immediate enforcement. After a confession of judgment pursuant to the statute, the remedy available for collection of the fine is limited to a civil proceeding on the bond given pursuant to the statute, the remedy available for collection of the fine is limited to a civil proceeding on the bond given pursuant to the statute. See McInturff v. State, 207 Tenn. 102, 338 S.W.2d 561 (1960). This is an

indication that the legislative intent is for fines to be noninterest bearing until judgment is confessed as provided by statute.

Criminal and penal statutes are to be strictly construed, Kimsey v. State, 192 Tenn. 421, 241 S.W.2d 514 (1951); Crow v. State, 192 Tenn. 362, 241 S.W.2d 429 (1951).

In McCreary v. First National Bank, 109 Tenn. 128, 70 S.W. 821 (1902), suit was brought in Chancery Court to recover a penalty pursuant to an Act of Congress allowing for such recovery against national banks for knowingly collecting usurious interest. After proof, the Chancery Court rendered a decree in favor of the complainant for the penalty prescribed by the statute with interest from the date of the filing of the bill. The Court of

Chancery Appeals affirmed except for the interest allowance and our Supreme Court in affirming the Court of Chancery Appeals disallowance of interest said:

> The act of Congress makes no provision for the allowance of interest, but fixes the amount of recovery at twice the amount of the usury charge. Laws prescribing penalties and forfeitures are strictly construed, and, in the absence of any authority in the act for interest on the penalty we cannot superadd it.

Id. at 142, 70 S.W. at 821

In the case before us, there is no statutory provision for interest on the fines imposed on the corporation, and therefore, it cannot be added thereto. Since the corporation cannot be liable for interest on the fines, Owens individually is not liable for interest on the fines.

The judgment of the trial court awarding interest on the fines is

reversed, the judgment in all other respects is affirmed and this case is remanded for such further proceedings as necessary. Costs are divided equally between appellant and appellee.

CRAWFORD, J.

TOMLIN, J. (Concurs)

HIGHERS, J. (Concurs)

IN THE SUPREME COURT
OF TENNESSEE
AT JACKSON

DANNY M. OWENS, Individually,
and AMAL INVESTMENTS, INC.,

Plaintiffs-Appellants/Appellees,

vs. Shelby Equity

STATE OF TENNESSEE,

Defendant-Appellee/Appellant.

O R D E R

The application for permission to appeal filed on behalf of Danny M. Owens, individually and Amal Investments, Inc. is denied at the cost of the applicants. The application for permission to appeal filed on behalf of the State of Tennessee is granted.

PER CURIAM

Supreme Court, U.S.
FILED
MAY 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

(2)

No. 85-1719

DANNY M. OWENS, Individually,
and AMAL INVESTMENTS, INC.,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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STATEMENT OF THE CASE

Petitioners herein seek review of an order of the Tennessee Supreme Court which denied permission to appeal a judgment of the Tennessee Court of Appeals, Western Division, which affirmed a judgment of the Chancery Court of Shelby County, Tennessee holding Petitioner, Danny M. Owens, individually (hereinafter "Owens"), and AMAL Investments, Inc. (hereinafter "AMAL") liable for certain fines which had been levied against a corporation, Danny's Sandwich Shop, Inc. for violation of the Tennessee Obscenity Law.

Because the chronology of the events and pleadings is important to the application of controlling substantive law, Respondent, State of Tennessee, will recite the order of relevant events in detail. The chronological history of this cause will show the inapplicability of the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227 (hereinafter referred to as the "Treaty"), and that review by this Honorable Court is unnecessary.

On March 31, 1980, Danny Elliott, Sr., sent a charter and form designating himself as a registered agent for Danny's Sandwich Shop, Inc., d/b/a Danny's (hereinafter referred to as "Danny's"), to the Tennessee Secretary of State's Office for filing.

A certified copy of the charter dated April 7, 1980 was sent to Danny Elliott, Sr., who is not a party to this proceeding, from the Secretary of State.

On April 7, 1980, Owens paid $1,000.00 for all outstanding shares of stock in Danny's. It should be noted that this $1,000.00 was the stated minimum amount of

consideration to be paid for Danny's shares prior to its commencing business under the provisions of its charter.

On October 1, 1981, five indictments were returned against Owens, individually, Danny's Sandwich Shop, Inc. and several individuals for violation of T.C.A. §39-6-1104, the Tennessee Obscenity Law.

Thereafter, on February 5, 1982, Owens was indicted on five state assault to murder charges.

On February 4, 1983, Owens was extradited from Great Britain, pursuant to the Treaty, supra, by the State of Tennessee, for the five assault to murder charges, and by the United States Government, for federal firearms violations.

On August 26, 1983, following a criminal trial of the obscenity charges against Danny's Sandwich Shop, Inc., a jury verdict was returned and a $200,000.00 fine was imposed against what the State of Tennessee believed to be a valid corporation.

On October 19, 1983, Owens transferred all of his interest in Danny's to AMAL, another "corporation" wholly owned and controlled by Owens. Owens signed the transfer of assets both as an individual and as president of AMAL. On the same day, Owens executed an identical transfer from Danny's to AMAL executing this document as president of both entities.

On October 21, 1983, Owens, individually, Danny's and AMAL filed a Petition for Temporary Restraining Order requesting that the State be enjoined from executing upon any of the assets of Danny's, alleging that all assets were the property of Owens individually.

On November 8, 1983, the State, having been made aware by this Petition that Danny's Sandwich Shop, Inc.

was a sham corporation with no assets, responded by counterclaiming to pierce the corporate veil, to hold Owens personally liable for the State's judgments against Danny's, for interest on said judgments, to set aside the fraudulent conveyances to AMAL and to enjoin Owens and Danny's from disposing of any property - said counterclaims being compulsory under Rule 13.01 of the Tennessee Rules of Civil Procedure.

On March 15, 1984, the State entered a Nolle Prosequi of the charges against Owens, individually, for violation of T.C.A. §39-6-1104.

Following a two-day trial, on September 12, 1984, Chancellor George Lewis ruled that: (a) the corporate veil of Danny's Sandwich Shop, Inc. should be pierced subjecting Owens to individual liability for the $200,000.00 criminal judgments; (b) the State was entitled to recover interest of 10% per annum on said $200,000.00 from the date of the Criminal Court judgment; (c) Owens was enjoined from transferring, mortgaging or encumbering any property owned or controlled by him until the judgment was satisfied; (d) the fraudulent conveyances from Owens and Danny's Sandwich Shop, Inc. to AMAL were set aside and (e) Owens' application for an injunction was denied.

Owens then appealed, alleging that the Chancery Court lacked jurisdiction to render a judgment against him because he was "protected" by the Treaty and therefore immune from civil judgment. Owens also alleged that the Chancellor erred in awarding interest from the date of the criminal judgments against Danny's Sandwich Shop, Inc.

On August 12, 1985, the Tennessee Court of Appeals for the Western Section at Jackson entered its judgment

in this cause, affirming the lower Court with regard to the inapplicability of the Treaty and reversing as to the interest question, holding that interest was due by Owens, individually, only from the date of entry of the Chancery Court judgment against him individually.

Thereafter, Owens sought permission to appeal the Treaty issue to the Supreme Court of Tennessee. The State filed an Application for Permission to Appeal the interest issue.

On January 21, 1986, an Order of the Supreme Court of Tennessee was entered denying Owens' application to appeal and granting the State's appeal of the interest issue. On May 12, 1986, the Supreme Court of Tennessee affirmed the lower appellate court's ruling on the interest issue by holding that interest was not recoverable on the criminal judgments.

Summarizing these significant developments, Respondent will direct the attention of the Court to the crucial facts. Indictments were returned against Danny Owens, individually, Danny's Sandwich Shop, Inc. and several other individuals alleging violations of T.C.A. 39-6-1104.

Thereafter, Owens was indicted on five state assault to murder charges and shortly afterwards fled the jurisdiction.

Owens was subsequently extradited from Great Britain on both state and federal charges. Although acquitted of the federal charges, he entered a guilty plea to the state assault to murder charges.

Thereafter, Danny's Sandwich Shop, Inc., d/b/a Danny's was tried and convicted and a fine assessed against the corporation in the amount of $200,000.00.

Owens then filed suit against the State seeking an injunction prohibiting the State from executing on any of the assets of Danny's Sandwich Shop, Inc., claiming the assets were his personal property. The State responded by filing a compulsory counterclaim.

After a trial on the merits in the Chancery Court of Shelby County, it was ruled that the corporate veil should be pierced and Owens held personally liable for the debts of the corporation. It was also ruled that post-judgment interest, in the amount allowable pursuant to T.C.A. §47-14-121, should be assessed from the date of the Criminal Court judgment.

Owens then appealed, alleging that the lower court lacked jurisdiction due to the Treaty and that the Court erred in allowing interest to be assessed from the date of the Criminal Court judgment.

The Court of Appeals for the Western Section at Jackson ruled that the Treaty did not afford Owens protection in the case at bar but agreed that under state law interest could not be assessed against Owens personally on a judgment rendered in Criminal Court against his corporation.

Thereafter Owens sought permission to appeal to the Supreme Court of Tennessee with regard to the Treaty question and the State appealed the interest question.

The State Supreme Court denied Owens' application, and granted the State's application on the purely State question of post-judgment interest on a Criminal Court judgment. The Supreme Court of Tennessee subsequently affirmed the lower appellate court's ruling on the interest issue by holding that interest was not recoverable on the criminal judgment.

ARGUMENT

I. THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IS INAPPLICABLE TO THE CASE AT BAR.

The only issue presented for review by the Petitioners is whether the Courts below erred in holding that the trial court had jurisdiction to impose a civil judgment against Owens and had not violated the Treaty by doing so.

The pertinent part of the Treaty is contained in Article XII and reads as follows:

ARTICLE XII

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that party to a third state—

(a) Until after he has returned to the territory of the requested party; or

(b) Until the expiration of the thirty days after he has been free to return to the territory of the requested party.

(2) The provisions of paragraph (1) of this Article shall not apply to offences committed, or matters arising, after extradition. 28 UST at 233.

The law governing extradition has certain well-defined parameters, one of which is referred to as the "Rule of Speciality," a principle of international law that prohibits the requesting country from "prosecuting or punishing the extradited party without the permission of the surrendering country for any offense committed prior to his extradition, except that for which he was extradited." *Berenguer v. Vance*, 473 F.Supp. 1195 (1979). Although Petitioners contend that the State's actions in the case at bar are a violation of this "Rule of Speciality", there are several factors, any of which would preclude application of the "Rule of Specialty" to the case at bar and all of which will be discussed in greater detail in the following sections.

The most compelling of these factors is the fact that the cause of action in the instant case did not accrue to the State until August 26, 1983 when the jury verdict against Danny's Sandwich Shop, Inc. was rendered, thereby creating a debtor-creditor relationship between the State and Danny's Sandwich Shop, Inc. Because this relationship and the subsequent cause of action against Owens did not exist until some nine months after Owens' extradition, the instant case falls squarely within the provisions of Article XII (2) of the Treaty as a matter arising after extradition and as such is specifically exempted from the "Rule of Specialty."

The instant case is also a classic example of an "Implied Waiver" in that the case at bar was instituted, not by the State, but by Owens when he filed his Petition for Temporary Restraining Order on October 21, 1983, and thereby voluntarily submitted himself and this cause of action to the jurisdiction of the Courts below.

The State would show that the great weight of United States and United Kingdom case law supports its contention that the Treaty and "Rule of Specialty" does not protect an individual from service of process in a civil action.

The State would further show that its rights regarding jurisdiction over Owens were in no way enlarged by virtue of his extradition. The State, at all times, could have proceeded against Owens either by way of its Long Arm Statute, T.C.A. §30-2-214, or by an in rem proceeding against his real estate in Tennessee.

A. The Cause of Action in the Case at Bar Did Not Accrue Prior to Owens' Extradition From the United Kingdom and, Thus Does Not Fall Within the Parameters of Article XII of the Treaty.

The cause of action in the instant case did not accrue to the Respondent until August 26, 1983, when a jury verdict was returned against Danny's Sandwich Shop, Inc., d/b/a Danny's, thereby making the State a judgment-creditor of said corporation.

It was not until after Owens filed his petition that the State, pursuant to T.C.A. §40-24-105, proceeded "to collect the criminal fine in any manner a judgment in a civil action may be collected" by filing its petition to pierce the corporate veil. Prior to the rendering of the jury verdict, the State had no monetary claims against Danny's Sandwich, Inc., d/b/a Danny's and even then, the State was unaware that it had any cause of action against Owens for the collection of these newly-obtained claims against the corporation.

Petitioners argue that this action is based upon facts which occurred prior to Owens' extradition, when, in

fact, said cause is based upon a judgment against a corporate defendant and Owens' continuing treatment of said corporation. Petitioners seek to tie the facts of the instant case to the facts of the criminal case, even though they do not pertain to each other.

It should be noted that appearances were made on behalf of the corporation by counsel during the criminal trial and that the State exhibited no intention to pursue Owens, individually, until Owens filed his original petition in the Chancery Court and revealed the fraud he had perpetrated against the State by his operation of the sham corporation and by his stripping of the "corporate" assets immediately following entry of the criminal judgments. The State would show that in fact, Owens could not have been fined individually for a violation of T.C.A. §39-6-1104, because the statute only contains provisions for imprisonment of individuals.

This Court will recognize the long-standing rule that "an action cannot be maintained unless at the time of issuance of the original complaint there be an actual, subsisting cause of action." *Tennessee Jurisprudence,* Vol. 1 p. 165, and the cases cited at Note 20 (also *see Shepard v. Lanier,* 241 S.W.2d 587, 192 Tenn. 608 (1951)).

Black's *Law Dictionary,* Fifth Edition, defines "accrue" as follows:

> Cause of action. A cause of action "accrues" when a suit may be maintained thereon. *Dillon v. Board of Pension Commissioners of City of Los Angeles,* 18 Cal. 2d 427, 116 P.2d 37, 39. Cause of action "accrues", on date that damage is sustained and not date when causes are set in motion which ultimately produce injury. *City of Philadelphia v. Lieberman,* C.C.A. Pa., 112 F2d 424, 428. Date of injury. *Fredericks v.*

Town of Dover, 125 N.J.L. 228, 15 A.2d 784, 787. When actual damage has resulted. *National Lead Co. v. City of New York,* C.C.A. N.Y., 43 F.2d 914, 916. As soon as contract is breached. *Wichita Nat. Bank v. United States Fidelity and Guaranty Co.,* Tex. Civ. App. 147 S.W.2d 295, 297. An action for malpractice against an attorney does not accrue until the client knows or should know of the attorney's error. *Hendrickson v. Sears,* 365 Mass. 83, 310 N.E.2d 131. The point in time at which a cause of action "accrues" is important for purposes of running of statute of limitations.

It is clear from the above-cited authorities that the State of Tennessee could not have maintained an action against Owens individually based on the facts of this case until after the jury verdicts were rendered against Owens' corporation on August 26, 1983.

It is a well-recognized principle of international law that any protection afforded the extradited party by the "principle of specialty" extends only to offenses committed prior to extradition and not to any subsequent offenses. *Berenguer v. Vance,* 473 F.Supp. 1195 (1979); *Shapiro v. Ferrandina,* 478 F.2d 894, 905 (2d Cir.) (Collecting authorities), cert. dismissed, 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed. 2d 133 (1973); 6 M. Whiteman, *Digest of International Law* at 1095, 1100 (1968), 1 Bassiouni, *International Extradition United States Law and Practice* at VII §6-8, §6.1 (1983).

This rule is also expressly stated in the Treaty at Article XII wherein it is said, "The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition." Owens was extradited to the United States on February 4, 1983 and the State of Tennessee's cause of action did not accrue until August 26, 1983, thus placing its cause of action in

this case outside of any protection which might be afforded Owens by way of Article XII or the "Rule of Specialty." This would also apply to the fraudulent conveyances made by and between Owens, Danny's Sandwich Shop, Inc., and AMAL on October 19, 1983.

B. Owens, by Way of His Conduct, Has Waived All Rights He May Have Had Under the Treaty.

The case now before the Court was instituted, not by the State of Tennessee, but by Owens when he filed his Petition for Temporary Restraining Order on October 21, 1983, and thereby voluntarily submitted himself and the cause of action to the jurisdiction of the Court below.

The State of Tennessee first became aware of Owens' abuse of the corporate form at that time and filed its original claim on November 8, 1983,—and then, only by way of a compulsory counterclaim under T.R.C.P. Rule 13.01.

It has long been held that any person claiming a right under an extradition treaty by way of the "Rule of Specialty" may waive the jurisdictional defect and proceed to trial. Thus, it was said:

> The individual in question may, however, waive the application of the principle by consent to be prosecuted for the offense charged in the extradition request. In such a case, it appears that the surrendering state could not claim the doctrine. 1 Bassiouni, *International Extradition United States Law and Practice*, VII §6-8, §6.1.

This principle was also noted by the Court in *United States v. Sobell*, 142 F.Supp. 515 (2d Cir., 1952), when it stated that:

> . . . any question as to the trial court's jurisdiction over his person was voluntarily waived by him . . . 142 F.Supp. at 521.

And, the *Sobell* Court further stated:

> . . . it will be held to have violated the contracted obligations of the Treaty and the Courts will find themselves to be without jurisdiction over the defendant, *unless he waives this issue.* 142 F.Supp. at 524. (Emphasis added.)

The State of Tennessee asserts that by filing his petition and forcing the State of Tennessee to counterclaim, Owens impliedly waived all objections he had to the jurisdiction of the Court. Owens' conduct is a classic example of an implied waiver and falls squarely within the definition found in Black's *Law Dictionary,* Fifth Ed., wherein "Implied Waiver" is defined, in pertinent part as follows:

> A waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or *where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver,* provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby. To make out a case of implied "waiver" of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amounting to an estoppel on his part *Rosenthal v. New York Life Ins. Co.,* C.C.A. Mo. 99 F.2d 578, 579. (Emphasis added.)

Also, there is the long-settled principle of law that when a party makes an appearance in Court, other than a special appearance, he has waived all objections to the issue of personal jurisdiction. *Baldwin v. Iowa State Traveling Men's Association,* 283 U.S. 522 (1931). In *St. John v. Superior Court,* 178 Cal.App. 2d 794, 3 Cal.Rptr. 535, 84 ALR2d 415, dealing with the immunity from

service of process of a nonresident witness, the Court held:

> Our courts have consistently recognized an exception to the granting of immunity in those cases where the second action, in which immunity is claimed, 'arises out of or involves the same subject matter as one in which the nonresident has made a voluntary appearance.' *Von Kesler v. Superior Court,* 109 Cal. App. 89, 292 P. 544; *Slosberg v. Municipal Court,* 101 Cal.App.2d 238, 225 P2d 312; *Velkov v. Superior Court,* 40 Cal.2d 289, 253 P2d 25, 35 ALR2d 1348."

The instant case indeed arises out of and involves the same subject matter as the original petition which was filed by Owens and AMAL. Thus, Owens has waived his right to assert any objection he may have had to jurisdiction.

C. The Extradition Treaty Does Not Protect Against Civil Suit.

The Treaty deals exclusively with criminal offenses not civil actions. Each and every "offense" listed in the Treaty is a *criminal* offense. And, in Black's *Law Dictionary,* Fifth Edition, "offense" is defined as:

> A Felony or misdemeanor, a breach of the *criminal laws.* The word "offense," while sometimes used in various senses, generally implies a felony or a misdemeanor infringing public as distinguished from mere private rights, punishable under the criminal laws . . . (Emphasis added.)

This definition of "offense" was adopted by this Honorable Court in *U. S. v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234 (1886).

In *Rauscher,* the defendant was indicted for cruel and unusual punishment on the high seas, but was extradited

from Great Britain, under a treaty dated August 9, 1842, on a charge of murder on the high seas. The defendant objected that this was not the offense for which he was extradicted and he, therefore, should be freed.

This Court, after a review of the history of extradition, formulated the "Rule of Specialty" to cover such circumstances. Throughout its opinion, this Court not only limited the term "offense" to a criminal context; but, it expressly refused to extend the "Rule of Specialty" to civil cases. Thus, the Court stated:

> *The difference between serving process in a civil action* . . . whether arrest be an incident to that process or not, *and the indictment and prosecution of a person similarly situated for a crime not mentioned in the treaty of extradition under which the defendant was by force brought to this country, is too obvious to need comment. And while it is unnecessary to decide now whether he could be so served with process in civil proceedings,* it does not follow that he would be equally liable to arrest, trial, and conviction for a crime . . ." *U. S. v. Rauscher,* 119 U. S. at 427. (Emphasis added.)

The "Rule of Specialty" was again considered in the case of *Fiocconi v. Attorney General of The United States,* 462 F.2d 475 (2d Cir., 1972). In *Fiocconi,* the defendants were extradicted from Italy on charges of conspiracy to import heroin. Although crimes involving narcotics were not among those listed in the Extradition Convention between the two governments (15 Stat. 629 (1868)), they were extradicted to the State of Massachusetts pursuant to the principle of comity.

Thereafter, while the defendants were out on bail, they were indicted on charges in New York; and, the defendants, being unable to post bail, were confined.

The *Fiocconi* Court, in considering whether such action was a violation of the "Rule of Specialty", stated:

> That extradition is a matter of treaty or of comity between governments; that a breach of faith by the receiving government entails international consequences; but that the *treaty or practice confers no rights on persons who have been so extradited unless this has been spelled out.* (Citing as an example the French Treaty considered in *United States ex rel. Donnelly v. Mulligan,* 74 F.2d 220, 221 (2d Cir. 1934)). 462 F.2d at 478. (Emphasis added.)

The treaty with which the Court is concerned in the case at bar contains no reference to, and does not concern itself with, civil actions. Although Petitioners argue that absolute immunity from civil actions is also conferred upon the relator, this is not the case as was aptly noted by the Court in *Fiocconi,* wherein it was said:

> If the countries had intended that the requesting government could not try the accused for any crime committed before the time of his surrender other than the crime for which he was extradited, *they could have accomplished this by adopting one of the standard clauses to that end.* (See 1 J. Moore, Extradition §§148-49, at 194-96 (1891)). 462 F.2d at 481. (Emphasis added.)

The State of Tennessee would agree with the Judge Friendly's holding in *Fiocconi,* to wit: if the United States and the United Kingdom had intended for the treaty to grant immunity from civil actions, they would have included such a standard clause in the treaty. The State of Tennessee would show that such clauses have been in use since at least January 6, 1909, when the United States and France entered into an extradition treaty which states, at Article VII, as follows:

> No person surrendered by either of the High contracting Parties to the other shall be triable or tried or be punished for any crime or offense committed prior to his extradition, other than the offense for which he was delivered up, *nor shall such person be arrested or detained on civil process for cause accrued before extradition,* unless he has been at liberty for one month after having been tried, to leave the country, or, in case of conviction, for one month after having suffered his punishment or having been pardoned. 37 Stat. 1531. (Emphasis added.)

Petitioners also cite the cases of *In Re Baruch,* 41 F. 472 (1890) and *In Re Reinitz,* 39 F. 204 (1889) to support their assertion that the "Rule of Specialty" is applicable to civil proceedings when, in fact, both cases dealt solely with the issue of civil *arrest.*

In *In Re Baruch, supra,* the defendant was brought to New York State from the state of New Jersey under a warrant issued by a commissioner of the Court, which was based upon the petition of the Austria-Hungarian Consul to procure the extradition of the defendant from the United States to Austria on a charge of embezzlement of public funds of the Austria-Hungarian Empire. After the defendant had remained in jail for approximately one year, it appeared to the Court that the charge of embezzlement could not be sustained, whereupon the extradition proceedings were discontinued and the defendant was discharged. The defendant was immediately arrested upon his discharge on an Order of Arrest issued in a civil suit based on conversion of the same funds which the defendant had been accused of embezzling in the extradition proceedings.

The prisoner petitioned the U. S. District Court on a Writ of Habeas Corpus and Certiorari claiming a violation

of the "Rule of Specialty." The District Court concluded that the prisoner was not subject to civil arrest in the state of New York and had the prisoner removed to the state of New Jersey.

Some six months earlier, the same District Court had decided *In Re Reinitz, supra,* in which the prisoner had been extradited from Ireland to United States on a charge of forgery. Upon his being acquitted and released on the charge contained in the extradition warrant, the prisoner was immediately arrested in a civil action for conversion.

The Court, refusing to make a distinction between an arrest in a criminal action and in a civil action, stated that, "No reasons are perceived why the limitations of the treaty . . . are not applicable to a *civil arrest* as to a criminal one." *In Re Reinitz,* 39 F. at 207. (Emphasis added.)

The distinction between civil arrest and service of process in a civil action is illustrated by Black's *Law Dictionary,* Fifth Edition, wherein "service of process" is defined as follows:

> The service of writs, summonses, signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left. . .

While "civil arrest" is defined as follows:

> The *apprehension* of a person by virtue of a lawful authority to answer the demand against him in a civil action . . . (Emphasis added.)

And, the term "apprehension" is defined as follows:

> The seizure, taking, or arrest of a person on a criminal charge.
>
> Civil law. A physical or corporal act (corpus), on the part of one who intends to acquire possession

of a thing, by which he brings himself into such a relation to the thing that he may subject it to his exclusive control.

Although *Reinitz* and *Baruch* are in direct conflict with the majority of case law and authorities (See e.g. *Adriance v. Lagrave* (1874), 59 NY 110, 17 Am Rep 317, Reug 1 Hun 689, *Martin v. Woodhall* (1889), 24 Jones and S 439, 4 NYS 539 (which would allow even civil arrests), *Caldwell,* 8 Blatchf. 131, *Allen v. Dykers,* 3 Hill 539, 597, *Childs v. Smith,* 55 Barb. 45, 53, *Rich v. Husson,* 1 Duel. 617, 621, *Billings v. Baker,* 28 Barb. 343, *Clarke on Extradition,* 2d Ed. p. 90, *Moore on Extradition,* Vol. 1, 270, 740-741, and the English case of *Pooley v. Whetham* (1880, Eng.), LR 15 Ch. Div. 435 (which allows process in a civil action)), the Court is not plagued with the question of "civil arrest" in the instant case.

In the case at bar, service of process was accomplished on Owens by way of a compulsory counterclaim under Rule 13.01 of the Tennessee Rules of Civil Procedure. Owens was not arrested nor was he deprived of his liberty in any way as a result of these civil proceedings.

Thus, the critical factor, deprivation of liberty, according to *Reinitz* and *Baruch* needed to invoke the "Rule of Specialty" is not present in these proceedings.

It is a well-settled principle of law in Tennessee that a defendant appearing in the state under legal compulsion, as in the instant case, is not immune to service of process in a civil action unless said criminal process is a mere ruse, pretext or is instituted in bad faith for the bare purpose of getting the defendant into the jurisdiction in order to serve him with such civil process. *Anderson v. Atkins* (1930), 161 Tenn. 137, 29 S.W.2d 248, *McNabb v. Lynn* (1937), 171 Tenn. 8, 120 S.W.2d 3, *Broaddus v.*

Patrick (1941), 177 Tenn. 335, 149 S.W.2d 71. This would appear to be the rule in cases concerning international extradition as well. (*See* e.g. Hackworth, *Digest of International Law*, Vol. IV, Department of State, Publication #1756.)

In the case at bar, Owens was extradited on federal firearms charges and interstate shipment of stolen property (he was subsequently acquitted on these charges), as well as five state charges of assault to murder, to which Owens later plead guilty. These circumstances, coupled with the fact that these proceedings were initiated by Owens, completely foreclose any argument by Owens that his extradition from the United Kingdom was instituted in bad faith or for the bare purpose of bringing him into the jurisdiction of the Court to be served with civil process.

The inapplicability of the "Rule of Specialty" to the case at bar is further illustrated by the practice of the Courts in determining if a proceeding is in violation of said rule.

Thus, it was said, in the case of *Fiocconi v. Attorney General of The United States*, 462 F.2d at 480 (2d Cir., 1972), that:

> . . . The *Rauscher* remedy must be applied in light of the considerations that give it birth. Since the object of the rule was to prevent the United States from violating international obligations, *it becomes essential to determine* as best one can, *whether the surrendering state would regard the prosecution at issue as a breach.* In *Rauscher*, this was altogether clear . . . (Emphasis added.)

And, in *U. S. v. Jeter*, 722 F.2d at 373 (8th Cir., 1983), it was said:

> In determining whether the principle has been abrogated in a given instance, the Circuit Courts have inquired "whether the surrendering state would regard the prosecution at issue as a breach." *See* e.g., id.; *United States v. Paroutian,* 299 F.2d 486, 491 (2d Cir., 1962).

In the case at bar, the law of the surrendering state, the United Kingdom, is well settled with regard to the inapplicability of the "Rule of Specialty" to civil proceedings. In the leading case of *Pooley v. Whetham* (1880, Eng.) LR 15 Ch. D. 435, Pooley was extradited from France for violations of the bankruptcy laws. Pooley was subsequently acquitted of violations of the bankruptcy laws and was thereafter brought to trial on civil charges, wherein he claimed immunity by way of the "Rule of Specialty."

Although faced with similar provisions with regard to the term "offense" as those found in the case at bar (*Pooley v. Whetham, supra*), the Court held Pooley subject to civil process. Thus, the United Kingdom would not consider civil proceedings such as those in the instant case to be a violation of the "Rule of Specialty' nor would it consider these proceedings to be a breach of faith.

D. There Was No Enlargement of the State of Tennessee's Rights in the Instant Case by Virtue of Owens' Extradition.

The Tennessee Court of Appeals for the Western Section at Jackson correctly interpreted the intent of the parties to the Treaty to be that the Treaty shall not be used to gain an advantage that would not otherwise be available to the prosecuting party. This is simply a restatement of the good faith test which was applied in the

cases of *In Re Baruch,* 41 F. 472 (1890) and *In Re Reinitz,* 39 F. 204 (1889).

Both *In Re Baruch, supra,* and *In Re Reinitz, supra,* were decided on the fact that the extradition process was used in order to obtain jurisdiction over the defendant. In other words, the process was used for the sole purpose of expanding the rights of the prosecuting party.

The Tennessee Court of Appeals, in determining the rationale for the rule of specialty, relied in part on M. Cherif Bassiouni, *International Extradition and World Public Order,* p. 353, 1974, wherein it is said, in part:

> The rationale for the doctrine rests on the following factors:
>
> * * *
>
> (2) The requesting state did not have in personam jurisdiction over the relator, if not for the requested state's surrender of that person.

The State of Tennessee would agree with the Tennessee Court of Appeals in that any and all proceedings in this cause could have been accomplished, either by way of the Long Arm Statute, T.C.A. §30-2-214, or by an in rem proceeding, even if Owens had remained in the United Kingdom. Owens could have still initiated this action by filing his complaint and the State of Tennessee would have still been compelled, under T.R.C.P. 13.01, to file its counterclaim.

Thus, the State of Tennessee gained no advantage whatsoever by way of Owens' extradition.

The Petitioners argue that we must deal with what actually happened and not what could have happened; and, yet they seek to have this Honorable Court apply this rationale without regard to the intention of the parties to

the Treaty or to the events as they actually occurred. They totally ignore the fact that Owens voluntarily submitted himself to the jurisdiction of the Court.

The Tennessee Court of Appeals was also correct in applying the long-standing test of whether the surrendering state would consider the action at issue as a breach of the Treaty. Said test is set out in *Fiocconi v. Attorney General of The United States,* 462 F.2d at 480 (2d Cir., 1971), wherein it is said that:

> . . . The *Rauscher* remedy must be applied in light of the considerations that gave it birth. *Since the object of the rule was to prevent the United States from violating international obligations, it becomes essential to determine as best one can, whether the surrendering state would regard the prosecution at issue as a breach.* (Emphasis added.)

And, in *U. S. v. Jeter,* 722 F.2d at 373 (8th Cir., 1983), wherein it was said:

> In determining whether the principle has been abrogated in a given instance, the Circuit Courts have inquired *"whether the surrendering state would regard the prosecution at issue as a breach."* *See* e.g., id.; *United States v. Paroution,* 299 F.2d 486, 491 2d Cir. 1962). (Emphasis added.)

As was discussed *supra,* the surrendering state in the case at bar, the United Kingdom, would not consider this civil proceeding against Owens to be a violation of the Treaty. *See* e.g., *Pooley v. Whetham* (1880), LR 15 Ch. D. 435. Thus, the Treaty is inapplicable and review by this Court is unnecessary.

CONCLUSION

The State of Tennessee requests that this Honorable Court deny review of this issue because there has been no violation of the Treaty; and, in fact, the Treaty is inapplicable to the case at bar for the following reasons: (a) the cause of action in the instant case arose subsequent to the extradition; (b) Owens, by his conduct, waived all rights he may have had under the Treaty; (c) the Treaty does not protect against civil suit; and (d) there was no enlargement of the State's rights by virtue of the extradition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 20th day of May, 1986, I have served the foregoing brief in opposition to Petition for Writ of Certiorari on the Petitioners by mailing three copies of same, postage prepaid, to Robert G. Gilder and Arch Boyd, 217 Exchange, Memphis, Tennessee 38105, counsel for petitioners.

JAMES EDWARD MULLIKIN
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Memphis, Tennessee 38103

SUPPLEMENTAL APPENDIX

(Filed May 12, 1986)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

Shelby Equity No. 2
(Court of Appeals No. 40)

Judgment of Court of Appeals
Affirmed; Case Remanded

DANNY M. OWENS, ET AL,
Plaintiffs/Appellees,

v.

STATE OF TENNESSEE,
Defendant/Appellant.

JUDGMENT

This cause coming on to be heard upon the proceedings from the Court of Appeals, Western Section at Jackson, application for permission to appeal having been heretofore granted, brief of the appellant; upon consideration whereof, this Court is of opinion that the judgment of the Court of Appeals should be affirmed and the cause should be remanded for the reasons set out in the opinion filed (a copy of which is attached hereto).

IT IS, THEREFORE, ORDERED AND ADJUDGED that the judgment of the Court of Appeals is affirmed and the cause is remanded to the trial court for any further proceedings which may be necessary.

Costs incident to the appeal in this Court are taxed to the State. All other costs will remain as assessed by the Court of Appeals, for which let execution issue, if necessary.

5/12/86.